STATE OF MICHIGAN

COURT OF APPEALS

HARVEY JONES, JR.,

Plaintiff-Appellee,

v

ROBERT DUANE RIBBRON, JAN OVERHEAD DOOR MANUFACTURING COMPANY, and AARON GENE SMITH,

Defendants,

and

SECURA INSURANCE,

Garnishee Defendant-Appellant.

UNPUBLISHED
August 17, 2006

No. 260040
Wayne Circuit Court
LC No. 97-738912-NI

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

Garnishee defendant Secura Insurance (Secura) appeals as of right the trial court's order awarding judgment for plaintiff in the amount of an underlying personal-injury verdict against Secura's insured, defendant Robert Ribbron. We affirm.

Secura sought to avoid liability under its policy issued to Ribbron on the basis that Ribbron failed to cooperate in the defense of the underlying personal injury action. Following a bench trial on stipulated facts, the trial court determined that Secura failed to prove actual prejudice resulting from Ribbron's noncooperation.

A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C); *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). We review de novo questions of law. *Little v Hirschman*, 469 Mich 553, 557; 677 NW2d 319 (2004).

Secura first argues that the trial court applied an erroneous standard in holding that Secura was required to demonstrate *actual prejudice* from Ribbron's noncooperation. Secura

maintains that, to meet its burden of proof, it was only required to produce evidence "tending to show prejudice." We disagree.

In *Allen v Cheatum*, 351 Mich 585, 595; 88 NW2d 306 (1958), our Supreme Court held that "whatever the law may be elsewhere, in Michigan we seem committed to the rule that in order for an insurance company to successfully claim noncooperation of its assured as a defense . . . it not only has the burden of showing such lack of cooperation but also that it was prejudicial" to the insurer's ability to contest the merits of the case.[1] See also *Anderson v Kemper Ins Co*, 128 Mich App 249, 253-254; 340 NW2d 87 (1983). "This question is generally one of fact and if the trier of the facts finds against the insurer, and that finding is supported by competent proofs, we do not usually disturb the result." *Allen*, *supra* at 595-596.

The *Allen* Court rejected the insurer's claim that proving actual prejudice was an "insurmountable burden" and that prejudice should therefore be presumed. *Id.* at 596. The Court stated that "[t]he Michigan rule is simply that where an insurer pleads noncooperation[,] prejudice will not be presumed from a mere showing of noncooperation, *but the insurer must also introduce proofs tending to show actual prejudice*, and further—and this is the nub of this case—that where the evidence on this score is conflicting, this Court will not disturb the finding of the trier of the facts if it is supported by competent evidence." *Id.* at 596-597 (emphasis added).

We find no merit to Secura's argument that it was not required to show actual prejudice. The Court in *Allen* clearly stated that actual prejudice must be shown. The phrase "proofs *tending to show* actual prejudice," on which Secura relies, is simply a reference to an evidentiary standard of relevance. MRE 401 defines relevant evidence as "evidence *having any tendency* to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence" (emphasis added). While the rules of evidence were not enacted until 1978, the standard was the same at common law. See *Berry v Dalman*, 335 Mich 646, 649; 56 NW2d 209 (1953); *Ames v MacPhail*, 289 Mich 185, 192; 286 NW 206 (1939). Thus, in order to prove "actual prejudice," Secura had to come forth with evidence *tending to show* actual prejudice. The trial court did not err in interpreting *Allen* as ultimately requiring Secura to prove that Ribbron's noncooperation actually prejudiced Secura's ability to defend the underlying action.

Secura also argues that Ribbron's noncooperation resulted in actual prejudice because the only statement of Ribbron's version of the accident was the police report, which was excluded as

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[1] Under *Allen*, if the burden of showing noncooperation and prejudice is met, the resulting policy violation provides a complete defense to a subsequent garnishment claim. See *Coburn v Fox*, 425 Mich 300, 306-307; 389 NW2d 424 (1986). Approximately 15 years after *Allen* was decided, no-fault insurance coverage became mandatory. *Coburn*, *supra* at 308-309. Accordingly, the *Coburn* Court held that an insured's noncooperation "is not a good defense in an action between a third party and an insurer to the extent of the statutorily required minimum residual liability insurance." *Id.* at 312. In this case, Secura concedes liability for the statutory minimum residual liability amount.

inadmissible hearsay. Without Ribbron's cooperation, Secura argues that it was unable to present his version of the accident at the underlying trial. Secura argues that the trial court erred in finding that the police officers who signed the report could have been called to testify concerning the accident, and in finding that Secura's alleged prejudice was attributable to its own inaction (i.e., failing to call the officers to testify) rather than to Ribbron's noncooperation.

In *Allen, supra*, our Supreme Court recognized that "where a showing of prejudice is required[,] it is usually inevitable that the merits of the main case must be gone into to some extent when the defense of noncooperation is raised." *Allen, supra* at 597. "That is frequently the only way the triers of the facts can intelligently appraise and determine whether actual prejudice did or did not exist." *Id.* On appeal, we review the evidence, "not to the end of substituting our judgment for that of the trier of the facts, but simply to find out whether . . . [there was] sufficient competent evidence . . . to reach the result . . . reached" in the underlying matter. *Id.*

In the underlying trial, plaintiff was the only witness to testify concerning the accident. Plaintiff claimed that Smith, the driver of the vehicle in which he was riding, proceeded to make a left turn believing that opposing traffic had cleared. He claimed that at that moment, Ribbron came in the opposite direction, appearing from behind another vehicle that was waiting to turn left and striking Smith's vehicle. At the garnishment trial, Secura proffered the police report, arguing that the report represented Ribbron's version of the accident. Because the report was excluded from evidence as hearsay, Secura asserts that it was prejudiced by Ribbron's absence.

The remarks contained in the police report state only that Smith "turned in front of" Ribbron's vehicle, and are therefore consistent with plaintiff's trial testimony.[2] Contrary to Secura's contention, we are not persuaded that the police report shows that Ribbron's own version of events would have differed from plaintiff's version.[3] Comparing the evidence that could have been presented had Ribbron testified to the evidence that was made available from other sources, we conclude that the police report does not support Secura's argument that Ribbron's noncooperation prejudiced its ability to defend the underlying action.

Because the police report is not inconsistent with plaintiff's trial testimony, we need not address whether the trial court erred in finding that Secura could have presented Ribbron's version of events to the jury by calling the officers to testify.

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[2] Unlike plaintiff, the police apparently believed that it was permissible for Ribbron to go around the other vehicle that was waiting to turn left. To the extent that the police report's "hazard action" scores tended to place the blame for the accident on Smith, they represent the opinion of the officers, and have no bearing on Ribbron's own version of how the accident occurred.

[3] Because Secura failed to obtain Ribbron's statement, either before or after the underlying trial, there is no way of knowing Ribbron's exact version of how the accident occurred.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White